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No. 87-103

In the Supreme Court of the United States

OCTOBER TERM, 1987

PIERRE BOULEZ, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an informal oral agreement between an IRS official and petitioner was enforceable as a binding compromise despite Treas. Reg. § 301.7122-1(d), which provides that a compromise agreement must be in writing in order to be effective.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 810 F.2d 209. The opinion of the Tax Court (Pet. App. 22a-34a) is reported at 76 T.C. 209.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1987. A petition for rehearing was denied on April 14, 1987 (Pet. App. 38a). The petition for a writ of certiorari was filed on July 13, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a French citizen, is a world-renowned conductor and music director who performed services in the United States during 1971-1974. In 1971, petitioner contracted with Beacon Concerts, Ltd., a British corporation, to serve as that organization's director and as a conductor for other musical organizations selected by Beacon.

Beacon in turn contracted with the New York Philharmonic Orchestra and the Cleveland Orchestra to provide petitioner's services. During 1971 and 1972, Beacon received $207,473 for petitioner's services and, after deducting its expenses and commissions, paid petitioner $188,495. Pet. App. 2a-3a.

Petitioner filed nonresident alien income tax returns for 1971-1974, but he failed to report on those returns any of the income earned as a result of the services contracted for by Beacon. Subsequently, the Internal Revenue Service (IRS) launched an investigation into petitioner's tax obligations, and it directed the New York Philharmonic Orchestra to withhold 30% of future payments made for petitioner's services. Petitioner then retained Irving Moskovitz as counsel. Pet. App. 3a-4a.

Moskovitz negotiated with the IRS concerning petitioner's outstanding tax liabilities and reached an oral agreement with Joseph McGowan, the IRS Director of International Operations.[1] According to the agreement, petitioner would file amended returns for 1973 and 1974 reporting his earnings from the performance of services for Beacon. In exchange, McGowan stated that the IRS would not assess any penalties for late filing or late payment for 1973 and 1974, and that the IRS would not require petitioner to pay $44,459 in income taxes attributable to the income that he received for performing services for Beacon during 1971 and 1972 (taxes that petitioner later conceded were legally due and owing). Petitioner filed amended returns for 1973 and 1974 and paid $53,841 in additional taxes for those years. He appended to these returns a letter from his counsel stating that these returns were "in accordance with [counsel's] conversation with" the Director. The IRS accepted the amended returns and imposed no penalties for 1973 or 1974. Pet. App. 4a.

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[1] The government stipulated to the existence of this oral agreement only for the purpose of enabling the Tax Court to dispose of petitioner's motion for summary judgment.

2. In 1977, the IRS commenced an unrelated audit of petitioner's 1975 return, which later was expanded to an examination of his 1971 and 1972 returns. The IRS subsequently issued a notice of deficiency with respect to petitioner's 1971 and 1972 tax years, asserting that he had improperly excluded from income the amounts received for the services that he performed in the United States. Petitioner sought redetermination of the deficiencies in the Tax Court and moved for summary judgment on two grounds: (1) that the oral agreement with Director McGowan constituted a binding compromise that precluded the imposition of any tax liability for 1971 and 1972; and (2) in any event, that the IRS was equitably estopped from asserting any tax liability with respect to those years, because petitioner had supposedly relied upon the agreement to his detriment. Pet. App. 5a. Petitioner conceded that the deficiency notices were correct and that decision should be entered against him in the event that he did not prevail on his "binding compromise" or "estoppel" theories (*id.* at 25a).

The Tax Court denied petitioner's motion for summary judgment and entered a decision in favor of the Commissioner (Pet. App. 22a-34a). The court pointed out that Treas. Reg. § 301.7122-1(d) requires that compromise agreements be in writing, and that Rev. Proc. 64-44, 1964-2 C.B. 974, establishes compliance with this regulation as a limitation on the delegation of authority to subordinate officials to enter into compromise agreements. The court accordingly held that Director McGowan did not have either actual or apparent authority to enter into a binding oral compromise agreement (Pet. App. 28a-30a). The court also concluded that the Commissioner was not equitably estopped from asserting the deficiencies at issue here, finding that petitioner had not suffered any substantial detriment in reliance on the alleged agreement. In this connection, the court noted that petitioner had the opportunity to file refund claims for 1973 and 1974 after

the IRS allegedly had breached the oral compromise by asserting a tax liability for 1971 and 1972, but that petitioner had not exercised that option. *Id.* at 31a-33a.

The court of appeals unanimously affirmed (Pet. App. 1a-21a). Although petitioner abandoned his "estoppel" argument on appeal (see *id.* at 20a), he reiterated his contention that the applicable regulation was invalid on the theory that Section 7122 of the Code[2] contemplates the existence of a binding oral compromise. The court of appeals rejected this contention, pointing out that Section 7122 itself neither sanctions oral compromises nor specifies that compromise agreements must be in writing. Rather, Congress left to the Secretary of the Treasury the task of promulgating regulations concerning the "requisite manner of offer and acceptance of compromises" (Pet. App. 8a (footnote omitted)). The court of appeals found that the regulation requiring that such compromises be in writing was a reasonable and permissible exercise of the Secretary's authority. *Id.* at 9a-16a. The court of appeals also rejected petitioner's contention that the Director had authority to waive the requirements of the regulation in this case (*id.* at 16a-19a).

ARGUMENT

Petitioner does not deny that the oral agreement here failed to satisfy the requirements of Treas. Reg. § 301.7122-1(d), which requires that compromise agreements must be in writing.[3] He contends, however, that the regulation is invalid and, alternatively, that its require-

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[2] Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.).

[3] Section 301.7122-1 provides in relevant part:

(d) *Procedure with respect to offers in compromise*—(1) *Submission of offers.* Offers in compromise shall be submitted on

ments effectively were waived by Director McGowan. The court of appeals correctly rejected both of these contentions, and its decision does not conflict with any decision of this Court or of another court of appeals. Indeed, petitioner concedes (Pet. 7) that this is a case of "first impression." Accordingly, there is no basis for review by this Court.

1. Petitioner contends (Pet. 9-11) that the requirement of Treas. Reg. § 301.7122-1(d) that compromise agreements be in writing is invalid because Section 7122 of the Code requires that oral agreements be accorded binding effect. This contention is mistaken for reasons well stated by the court of appeals (Pet. App. 9a-16a).

The regulation involved here was promulgated pursuant to the broad authority to issue regulations conferred upon the Secretary by Section 7805 of the Code. Such regulations are valid unless they are found to be unreasonable or plainly inconsistent with the statute. See, *e.g.*, *Commissioner* v. *Portland Cement Co.*, 450 U.S. 156, 169 (1981); *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 476 (1979). Section 7122 provides simply that the Secretary "may compromise" any tax case prior to reference to the Justice Department and that a written record of the compromise generally must be placed in the Secretary's files. Thus, while the statute itself does not address whether or not a compromise agreement must be in writing, the writing requirement set forth in the regulation plainly is not inconsistent with Section 7122.

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forms prescribed by the Internal Revenue Service which may be obtained from district directors of internal revenue, and should generally be accompanied by a remittance representing the amount of the compromise offer or a deposit if the offer provides for future installment payments.

* * * * *

(3) *Acceptance.* An offer in compromise shall be considered accepted only when the proponent thereof is so notified in writing. * * *

Indeed, the regulatory requirement that there be a written agreement is fully in accord with the congressional intent that underlies Section 7122. There is a longstanding congressional policy in favor of formal procedures for settling tax disputes. This Court has recognized that an informal agreement between a subordinate official and a taxpayer is not a binding settlement without the formal and statutorily-required approval of the Secretary of the Treasury, noting that Congress "did not intend to intrust the final settlement of such matters to the informal action of subordinate officials." *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 288-289 (1929). In fact, the legislative history of the earliest predecessors of Section 7122 indicates that Congress contemplated that compromise agreements would have to be made in writing. See Cong. Globe, 40th Cong., 2d Sess. 3775 (1868) ("no compromise can be made except with the written assent of the Secretary of the Treasury") (remarks of Sen. Sherman) and Cong. Globe, 37th Cong., 3d Sess. 906 (1863) ("Where every agreement of that sort is made in writing, * * * it strikes me that there is no great danger about it.") (remarks of Sen. Fessenden), *reprinted in* J. Seidman, *Seidman's Legislative History of Federal Income Tax Laws 1938-1861*, at 1059, 1060 (1938). Thus, there is evidence that Congress intended that compromise agreements should be made in writing in order to have binding effect. In any event, there is no basis for concluding that the regulatory requirement of a written agreement is inconsistent with congressional intent.

Petitioner rests his contrary assertion entirely on a comparison of Section 7122 with Section 7121 of the Code. Because Section 7121, which concerns closing agreements, specifically refers to an "agreement in writing," petitioner maintains that the failure to make a specific reference to written agreements in Section 7122 necessarily shows that Congress intended that oral agreements would be effective under the latter section. This conclusion simply does not

follow. At most, the comparison with Section 7121 indicates that Congress did not *itself* impose a writing requirement for compromise agreements; rather, it "left to the Secretary of the Treasury the task of promulgating regulations addressing the requisite manner of offer and acceptance of compromises" (Pet. App. 8a). The regulation applicable here is a reasonable implementation of the general congressional authorization in Section 7122, and there is no basis for holding it invalid. Because the informal oral agreement invoked by petitioner concededly did not meet the standards set forth in the regulation for a binding agreement, the court of appeals correctly rejected petitioner's attempt to rely on that agreement.[4]

2. Petitioner's contention (Pet. 11-15) that Director McGowan should be held to have "waived" the regulation's writing requirement is similarly without merit. It is clear that the requirement that a compromise agreement be made in writing in order to be binding is not one that can be waived by a subordinate official. The delegation of authority to subordinate IRS officials to compromise tax controversies is quite explicit on this point. Rev. Proc. 64-44, 1964-2 C.B. 974, provides:

> This is a "limited" delegation to the extent that the delegated authority must be exercised in accordance with the limitations prescribed by section 301.7122-1

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[4] Petitioner contends (Pet. 10-11) that, because the court of appeals failed to accept the inference that petitioner seeks to draw from Section 7121, the decision below conflicts with *General Electric Co.* v. *Southern Construction Co.*, 383 F.2d 135, 138 n.4 (5th Cir. 1967), cert. denied, 390 U.S. 955 (1968). This contention is fanciful. *General Electric* involved a completely different statute, and, in any event, the language cited by petitioner is dicta. Indeed, the court of appeals in *General Electric* specifically stated that it was *not* relying upon the mode of statutory construction that petitioner seeks to invoke.

> of the Regulations on Procedure and Administration and with procedures established by the National Office.[5]

Thus, Director McGowan was not authorized to enter into a binding oral compromise agreement, in contravention of the plain terms of Treas. Reg. § 301.7122-1(d), and there was no basis for petitioner to believe that McGowan had such authority.

Petitioner's assertion (Pet. 11) that the writing requirement is merely "directory," and that it can be waived at will by the Commissioner's delegate despite Rev. Proc. 64-44, is completely unsupportable. Petitioner is suggesting that a delegate is free to ignore the limitations imposed upon a delegation of authority to him. If a chain of command is to retain any meaning, it is the superior officer who decides what the authority of his delegate will be, not the other way around.[6]

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[5] For the reasons well stated by the court of appeals (Pet. App. 18a-19a), petitioner clearly errs in asserting (Pet. 14-15) that Rev. Proc. 64-44 was not applicable here because it was "rendered obsolete" by an intervening delegation order. Rev. Proc. 64-44, explicitly incorporating the writing requirement as a limitation on its delegation of authority, remained in full force until it was superseded in 1980 by Rev. Proc. 80-6, 1980-1 C.B. 586, which contained the same limitation.

[6] The cases relied upon by petitioner to support his "waiver" theory (see Pet. 11-13) are completely inapposite. In *United States* v. *Memphis Cotton Oil Co.*, 288 U.S. 62 (1933), this Court merely held that the Commissioner had to allow a taxpayer to amend a vague refund claim, rather than holding the claim until the time for filing had expired and then denying the claim on the technical ground that is was not sufficiently definite. The Court found that the purpose of the applicable regulation—giving adequate and timely notice to the Commissioner—was satisfied there by the filing of a timely claim with the opportunity to amend if the Commissioner objected to the lack of specificity of the claim. This rationale plainly provides no support for petitioner's effort to frustrate the purpose of the regulatory writing requirement involved in this case. See generally Pet. App. 16a n.53. By the same token, in *Cleveland Trust Co.* v. *United States*, 421 F.2d 475,

3. Petitioner raises two other claims that require only brief discussion. He asserts (Pet. 18-20) that principles of retroactivity do not permit the court of appeals' decision to be applied in this particular case. But there is no question of retroactive application here. Both Treas. Reg. § 301.7122-1(d) and the limited delegation of Rev. Proc. 64-44 were in effect when all the events relevant to this case occurred. Thus, petitioner appears to be contending that a valid regulation can never be applied to a taxpayer until after its validity has been upheld by a court. We are aware of no authority that supports this extravagant proposition.

Petitioner also asserts (Pet. 16-17) that he is entitled to prevail because the Commissioner failed to provide him with certain administrative files—files that petitioner asserts "would contain a written record confirming the oral compromise agreement" (*id.* at 17). But the government conceded for purposes of the summary judgment motion that there was an oral compromise agreement; the discovery of a written record in IRS files confirming the existence of such an oral agreement would not add anything to petitioner's case. Petitioner has never asserted, and does not assert here, that there was a written agreement between the parties that would satisfy the regulatory requirement; hence, he cannot prevail no matter what the IRS files would have revealed.

481-482 (6th Cir.), cert. denied, 400 U.S. 819 (1970), the court of appeals simply held that a Revenue Procedure permitting the Commissioner to set aside an "informal conference agreement" when the agreement was based upon a "clearly defined error" did not require the Commissioner to disclose the nature of the "clearly defined error" to the taxpayer. The case does not purport to hold that revenue procedures are only "directory." Moreover, unlike this case, *Cleveland Trust* did not concern limitations on a delegation of authority and did not involve an attempt by the taxpayer to avoid the effect of an unambiguous Treasury Regulation.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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